

# ORIGINAL

In the

## Supreme Court of the United States

OFFICIAL TRANSCRIPT OF PROCEEDINGS • [REDACTED]

H. L., ETC. )

APPELLANT, )

V. )

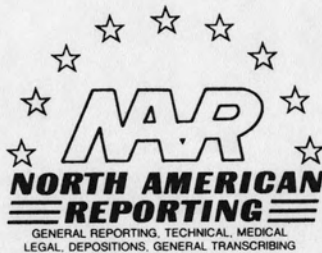
No. 79-5903 )

SCOTT M. MATHESON ET AL., )

APPELLEES. )

Washington, D.C.  
October 6, 1980

Pages 1 thru 49.



1 IN THE SUPREME COURT OF THE UNITED STATES

2 ----- :  
 3 H. L., ETC., :  
 4 Appellant, :  
 5 v. : No. 79-5903  
 6 SCOTT M. MATHESON ET AL. :  
 7 Appellees. :  
 8 ----- :

9 Washington, D.C.,  
 10 Monday, October 6, 1980

11 The above-entitled matter came on for oral argument  
 12 at 1:15 o'clock p.m.

13 BEFORE:

- 14 HON. WARREN E. BURGER, Chief Justice of the United States  
 15 HON. WILLIAM J. BRENNAN, JR., Associate Justice  
 16 HON. POTTER STEWART, Associate Justice  
 17 HON. BYRON R. WHITE, Associate Justice  
 18 HON. THURGOOD MARSHALL, Associate Justice  
 19 HON. HARRY A. BLACKMUN, Associate Justice  
 20 HON. LEWIS F. POWELL, JR., Associate Justice  
 21 HON. WILLIAM H. REHNQUIST, Associate Justice  
 22 HON. JOHN PAUL STEVENS, Associate Justice

23 APPEARANCES:

- 24 DAVID S. DOLOWITZ, ESQ., Parson, Behle & Latimer, 79 South  
 25 State Street, Salt Lake City, Utah 84147; on behalf of  
 the Appellant.
- PAUL M. TINKER, ESQ., Assistant Attorney General, 236  
 State Capitol, Salt Lake City, Utah 84114; on behalf of  
 the Appellees.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in H. L. and Others against Matheson, the Governor of Utah.

Mr. Dolowitz, I think you may proceed when you are ready.

ORAL ARGUMENT OF DAVID S. DOLOWITZ

ON BEHALF OF THE APPELLANT

MR. DOLOWITZ: Mr. Chief Justice, and may it please the Court:

The question before the Court today involves the validity of a Utah statute which provides that before an abortion may be provided to a minor, her parents must be notified if it is physically possible to do so.

The facts of the case involved a 15-year-old minor who determined she was in the first trimester of an undesired pregnancy, spoke with her social worker, determined that she should terminate that pregnancy. She determined further that her parents should not be involved, then consulted her treating physician --

QUESTION: The -- now, who's "she"? The social worker?

MR. DOLOWITZ: No. At this point the woman herself contacted the doctor and the doctor also had a social worker working with him. They consulted with her, determined with the social workers, the physicians, that her parents should not be

1 notified.

2 QUESTION: Now, who made that determination?

3 MR. DOLOWITZ: That determination was made,  
4 Mr. Justice Stewart, by the woman, the doctor, and the social  
5 worker.

6 QUESTION: By H. L.

7 MR. DOLOWITZ: All of them felt that the parents  
8 should not be involved.

9 QUESTION: Where in the record, counsel, is the  
10 finding or testimony that the doctor felt the parents should not  
11 be consulted?

12 MR. DOLOWITZ: That is in the complaint, and that was  
13 part of her testimony when she testified.

14 QUESTION: Could you cite the pages?

15 MR. DOLOWITZ: I can only refer the Court to the  
16 transcript of --

17 QUESTION: I read the transcript. The physician felt  
18 he could not do it without consulting the parents. But I  
19 didn't read the transcript to find any place that he felt it  
20 was in her best interest that the parents not be consulted.

21 QUESTION: Wasn't it a matter of notice to the  
22 parents rather than consulting the parents?

23 MR. DOLOWITZ: Yes, it was. Well, it is a matter of  
24 notice rather than consultation and if I said "consultation,"  
25 I misspoke myself, Mr. Justice Rehnquist. It's a question of

1 that they should not be given notice of it.

2 QUESTION: Now, where in the transcript or findings do  
3 you find anything that the physician thought it was contrary to  
4 her best medical interest that her parents not be notified?

5 MR. DOLOWITZ: That's what he told her as --

6 QUESTION: Where in what we have before us?

7 MR. DOLOWITZ: I believe that is in her testimony.  
8 I was looking at it. It is definitely testified by her that  
9 her counselor -- and I am looking in the pages 24 through 26 --

10 QUESTION: Appendix?

11 MR. DOLOWITZ: -- of the appendix, Mr. Chief Justice.  
12 And she said that she should go ahead without notifying --

13 QUESTION: Could you give us the verbatim?

14 MR. DOLOWITZ: I am looking now at her testimony and  
15 I am going down page 25:

16 "Q You consulted with a counselor that you were preg  
17 pre pregnant, or about the pregnancy?

18 A Yeah.

19 Q You determined after talking to the counselor  
20 that you should get an abortion?

21 A Yes.

22 Q You felt that you did not want to notify your  
23 parents --

24 A Right.

25 Q -- of that decision. You did not feel for your

1 own reasons you could discuss it with them?

2 A Right.

3 Q After discussing the matter with your counselor  
4 you still believed you should not discuss it with your  
5 parents?--

6 A Right.

7 Q -- and that they should not be notified?

8 A Right.

9 Q After talking the matter over with your counselor  
10 and the counselor concurred in your decision that your  
11 parents should not be notified --

12 A Right.

13 Q -- you were notified, you were advised that an  
14 ~~abort~~abortion could not be performed without notifying them?--

15 A Yes.

16 Q -- you came to see me about filing the suit.

17 A Yes.

18 Q You and I then discussed as to whether or not you  
19 had a right to do what you wanted to do?

20 A Yes.

21 Q You decided after our discussion you should still  
22 proceed with the action to try to obtain an abortion with-  
23 out notifying your parents?

24 A Right.

25 Q Now, at the time you signed the complaint, spoke

1 with the counselor and with me, you were in the first tri-  
2 mester pregnancy within your first 12 weeks of pregnancy?

3 A Yes.

4 Q Do you feel that from talking to the counselor  
5 and thinking the situation over and discussing it with me,  
6 that you could make the decision on your own that you wish  
7 to abort the pregnancy?

8 A Yes."

9 MR. DOLOWITZ: And then it goes on to say, "You were  
10 living at home."

11 QUESTION: Mr. Dolowitz, is that you testifying or  
12 the --

13 MR. DOLOWITZ: Oh, I'm asking the questions that she  
14 is answering; right.

15 QUESTION: Well, all she says is "yes."

16 MR. DOLOWITZ: That's correct, Your Honor, and if  
17 I may say so, I led her through this very carefully and the rea-  
18 son that I did that is, she had a highly unique fact situation,  
19 and as you read through the appendix you saw that this examina-  
20 tion took place after the Court had already denied a preliminary  
21 injunction and had ruled that the peculiar facts of her circum-  
22 stances made no difference. It was -- the only question, under  
23 the Utah statute, the trial judge felt, was whether it was phy-  
24 sically possible to notify her. Because then, Mr. Justice  
25 Rehnquist, after this, you see there's about ten pages of



1 colloquy between the court and --

2 QUESTION: Do you think that any of what you have read  
3 from the testimony so far supports a finding that her doctor  
4 told her that it was in her -- not in her best medical interests  
5 to get an abortion?

6 MR. DOLOWITZ: In terms of the record, it does not.  
7 Now, what happened there is I forgot to ask her that question.

8 QUESTION: Well, in your --

9 MR. DOLOWITZ: I had spoken with the doctor myself  
10 and the doctor told her that and I talked to her.

11 QUESTION: In your statement of the case, in your  
12 brief, Mr. Dolowitz, you say, "In consultation with both her  
13 physician and social worker, she determined that it was in her  
14 best medical interest that she be aborted and that her parents  
15 not be notified of either her decision or its implementation."

16 MR. DOLOWITZ: I do, sir, and that is the finding.

17 QUESTION: And that's a fair paraphrase of what you  
18 read us, isn't it?

19 MR. DOLOWITZ: Yes, it is, Mr. Justice Stewart. That  
20 is the finding of the court, of the trial court.

21 QUESTION: But it is not a finding that the doctor  
22 told her it was against her best interest?

23 MR. DOLOWITZ: It is not a -- it is a finding, I be-  
24 lieve, and I at this point would have to refer the trial court  
25 -- or this Court, Your Honor, to the specific findings, con

1 conclusions of law and in the findings that I'm referring to  
2 I am looking at page 40, Finding 7, of the Findings of Fact,  
3 page 40 of the appendix, where the trial court made the deter-  
4 mination that she should be aborted and that he felt -- that's  
5 the doctor -- that it was not in her best medical interest to  
6 do -- or was in her best medical interest to do so, but could  
7 not and would not perform an abortion on her without informing  
8 her parents prior to aborting her because of the statute.

9 QUESTION: Mr. Dolowitz, you have emphasized in  
10 your oral argument -- you have spent quite a bit of time on  
11 it, and our questions, and you did in the examination, direct  
12 examination of your witness, the importance, you have emphasized  
13 the importance of getting counsel and advice and assistance,  
14 lawyers, social workers, doctors. And you rest on the fact  
15 that she had the advice and counsel of all these people?

16 MR. DOLOWITZ: Yes, Mr. Justice.

17 QUESTION: What if she has the advice of no one?  
18 Just walked in off the street and said, I want to have an  
19 abortion, and the doctor said, not unless I notify the parents.  
20 No other factors. Would this be any different from the points  
21 that you have got here?

22 MR. DOLOWITZ: Factually it would, Your Honor.

23 QUESTION: And factually, would it be --

24 MR. DOLOWITZ: It would. But legally, in terms of  
25 the position I'm taking today, I am speculating -- I would

1 say, no. And the reason that I would --

2 QUESTION: You don't need to speculate on that, do  
3 you?

4 MR. DOLOWITZ: What?

5 QUESTION: You don't need to speculate on the Consti-  
6 tutional question, do you?

7 MR. DOLOWITZ: No. I would say --

8 QUESTION: It would make no difference, would it?

9 MR. DOLOWITZ: No. If she has the right of privacy,  
10 to go ahead on her own, then she has that right.

11 QUESTION: Now, she's 15 years old, isn't she?

12 MR. DOLOWITZ: That's correct.

13 QUESTION: Suppose she were 12? Same?

14 MR. DOLOWITZ: I would -- the problem, Your Honor, is  
15 I've -- then I move to speculation and I move to it in a very  
16 difficult area, and that is the level of maturity is such that  
17 as a 12-year-old she could be very mature, totally immature;  
18 though we're leaving something out, and that is that she is  
19 talking to a doctor and says, I want an abortion. But you're  
20 leaving out that the state has already said, who is going to  
21 practice medicine and what are reasonable standards? And the  
22 physician is going to say, I have a right to make a decision  
23 whether it's in your best medical interest and I'm not going to  
24 take an action which is in opposition to your best medical  
25 interest. And if the 12-year-old that you have asked me about

1 the doctor feels cannot rationally make that decision in her  
2 own best interest, he --

3 QUESTION: What about ten years of age?

4 MR. DOLOWITZ: I would give you the same answer.  
5 I think that you're dealing with a doctor-patient decision  
6 where the doctor who the state has said is licensed to practice  
7 medicine should be able to deal with his patient, and a minor,  
8 and deal without the outside influences; talk to that patient  
9 and say, at the end of that discussion, I'm not going to do  
10 this without your parents, I'm going to do this with your  
11 parents.

12 QUESTION: In Utah, under Utah law, if she had walked  
13 in, a girl of 10, 11, 12, 15, whatever, and said, I want my  
14 tonsils taken out but my parents won't send me to a doctor and  
15 won't agree to it, would the doctor be legally permitted to  
16 perform the tonsillectomy?

17 MR. DOLOWITZ: There is no law that prohibits it, but  
18 I believe that most physicians would not do it. But there is --

19 QUESTION: Because of the possibility of a malprac-  
20 tice suit, among other things, I suppose.

21 MR. DOLOWITZ: There is a difference, though, and  
22 that is the decision of this Court in Danforth and Bellotti II,  
23 and a statute of the State of Utah which states that a minor  
24 of any age can consent to any treatment regarding pregnancy.

25 QUESTION: Mr. Dolowitz, would you straighten me out?

1 I want to be sure about this. On page 25 of the appendix -- do  
2 you have it in front of you?

3 MR. DOLOWITZ: Yes, Mr. Justice Blackmun.

4 QUESTION: Down just below the middle there is a  
5 question: "After talking the matter over with a counselor,  
6 the counselor concurred in your decision that your parents  
7 should be notified" is what it says. Now, when you read it, you  
8 put a "not" in there. Should the "not" be in there?

9 MR. DOLOWITZ: It should have been, because if it  
10 wasn't, then I misspoke it at the time. Because it was very  
11 clear, all the way through, from the time that she came in,  
12 that she had spoken to her counselor, she had spoken to her  
13 counselors and her physician before she came to me, and that  
14 they all felt that this was a very unique situation and she  
15 should not, her parents simply shouldn't be notified.

16 QUESTION: Well, all I want to know is, whether you  
17 and opposing counsel agree that this is an error in the  
18 printing of the transcript, that the "not" is in there?

19 MR. TINKER: Yes. I agree, Mr. Justice Blackmun.

20 MR. DOLOWITZ: Now, Your Honor, what we are dealing  
21 with -- as you can see; and I realize from your questions,  
22 Mr. Chief Justice, that you're very concerned about the age of  
23 the woman involved. The problem is that I think that Utah has  
24 overstepped in doing that by saying that a parent must be noti-  
25 fied in every case. Because just as I answered to you that the

1 physician must be involved in making that decision --

2 QUESTION: Then are you saying that it might, the  
3 statute might be constitutional if it fixed the limit at  
4 age 12 or 14?

5 MR. DOLOWITZ: No, Your Honor, I would not. I would  
6 say it would be unconstitutional if it did that. But if it  
7 said that the physician -- if the words "if possible" -- and  
8 this, in fact, is I urged the Utah -- on the construction I  
9 urged on the Utah Supreme Court -- the language, if possible,  
10 should be construed to mean, "if medically appropriate";  
11 that, if the doctor in consultation with his patient feels that  
12 the parents should be notified, consulted, brought in, however  
13 that's to be phrased, that would be a rational statute, because  
14 it would be reasonable, it could be done.

15 QUESTION: But could it not also, could that phrase  
16 not also be intended to take into account a child who had been  
17 abandoned by her parents, didn't know where her parents were,  
18 her parents impossible to reach, that sort of thing?

19 MR. DOLOWITZ: Yes, and that --

20 QUESTION: Isn't that what the statute is aimed at?

21 MR. DOLOWITZ: Your Honor, the answer I'm going to  
22 say is that that might have been the intention and they added  
23 -- the Utah Supreme Court said, if possible, within a rational  
24 time. And the problem is, that makes it very vague, as to  
25 precisely what it means. And the problem that then comes from

1 that is, if you say, well, you know, if physically possible,  
2 like if they're on a trip, if they're somewhere else. You still  
3 have the same problem. But what happens if they're on the trip?  
4 But you have a social worker or a doctor who knows that family  
5 and says, gee, I'm glad they're on that trip; it is best not to  
6 notify them. So what happens when they're in town and he still  
7 feels it's best not to notify them? I can explain the reasons  
8 why that is good. I think Mr. Justice Powell in the Bellotti II  
9 decision did a very careful description of the reasons why a  
10 parent should not be notified.

11 I think there's a tendency to mix up the concept of  
12 notification and consultation, assuming that if you notify the  
13 parents you're going to bring them into consultation. But that  
14 isn't always true, that you bring parents in, and frequently  
15 you bring them in, and have the result that that will cause  
16 more trouble, if it's an abusive parent. If it's a parent who  
17 for a religious reason doesn't agree, they will impose their  
18 values on a child. Now, on that case, this is the problem with  
19 the statute: instead of being able to respond to the very par-  
20 ticularized questions you asked me, Mr. Chief Justice, this is  
21 a broad, it's an all-inclusive statute. It disregarded the  
22 concerns that this Court has stated, that in this area a sta-  
23 tute that's drawn should be drawn very narrowly, and very care-  
24 fully, and consider the interests of the minor. Because you  
25 asked me about a 10-year-old, a 12-year-old. That's not what

1 I'm talking about. Those are some of the circumstances. But  
2 Utah doesn't take any consideration into that.

3 H. L. -- you asked me when we started about a lot of  
4 the facts in this case. There is also another case that was  
5 filed between the decision of the Utah Supreme Court and the  
6 granting or taking of jurisdiction by this Court in this case.  
7 It was filed in the United States District Court for the Dis-  
8 trict of Utah. In that case four women have been granted in-  
9 junctions and allowed to obtain abortions by the determination  
10 of the trial judge in that case that they were mature minors,  
11 handling their own affairs -- one of them had another child --  
12 who, on their own, could make the decision, and in fact it  
13 would be detrimental to them to have their parents notified.

14 QUESTION: Those four plaintiffs were all emancipated,  
15 were they not? Not living with the parents?

16 MR. DOLOWITZ: Three of the four were; one was still  
17 living at home. And I've lodged the papers with the Clerk's  
18 Office if the Court wishes to pursue that so that, the findings,  
19 the conclusions, the orders, in each of those four cases -- the  
20 first one is included as an appendix to my brief. The other  
21 three I've lodged with the Clerk's Office.

22 Now, in each of those cases, they were mature minors  
23 and it was, and the trial judge, Judge Jenkins, determined that  
24 it would be detrimental to the parent-child relationship to  
25 notify the parents, in some cases because there'd been a split.



1 That's why the child had left; things were getting better. That  
2 would be broken out. These are just illustrations as to the  
3 overbreadth of the statute.

4 Then there's a second set of problems that come up,  
5 and that is the doctor-patient relationship has been invaded by  
6 this statute.

7 QUESTION: Mr. Dolowitz, before you leave those other  
8 cases, I don't understand their relevance to the issue presented  
9 by this case.

10 MR. DOLOWITZ: The relevance, Mr. Justice Stevens,  
11 tends to come from the observations of Mr. Justice Powell in the  
12 second Bellotti decision, and that is that as applied to two --  
13 I will call them categories of minors --

14 QUESTION: Well, let's say that the statute is uncon-  
15 stitutional as applied to a lot of people who are not before the  
16 Court. Assume that. How does that help you in this case?

17 MR. DOLOWITZ: In this case we're dealing with a  
18 subgroup of a minor where the determination had been made by  
19 the social worker and the physician that it was not in her best  
20 interest, and the trial court --

21 QUESTION: I thought you just agreed with Mr. Justice  
22 Rehnquist that there was no such determination, the child so  
23 determined after consultation with the doctor and the social  
24 worker?

25 MR. DOLOWITZ: If I said that, then that was not what

1 I meant. I think the determination was made by the social  
2 workers, by the doctor, by the woman.

3 QUESTION: You don't suggest anything that you read  
4 from the transcript said the doctor said it was not in her best  
5 interest to notify the parents?

6 MR. DOLOWITZ: Nothing that I read said that, and that  
7 means that when I asked the questions in the trial, I stopped  
8 one question too soon, because --

9 QUESTION: We review questions or cases on tran-  
10 scripts, not on unasked questions.

11 MR. DOLOWITZ: Well, I realize that, Mr. Justice  
12 Rehnquist, and one of the problems that was going on in this  
13 case was that from the prior determination of the trial judge  
14 that the only question that he considered important is, was it  
15 physically possible to locate the parents, meant that I was  
16 conducting that hearing with her to simply show that the facts  
17 alleged in the complaint were in fact correct. And then, when  
18 we got into the questions, as you see, Mr. McCarthy asked her  
19 the question of, you know, do you feel you can't discuss this  
20 with your parents? And she said, "Right." And he said, do  
21 you feel you can't discuss other problems with your parents?  
22 And she said "Right." And he said, what other problems? And  
23 at that point I objected. We went from there around to the ques-  
24 tion that if the only issue, as far as the Utah trial court was  
25 concerned, was was it in her best interest, or was -- I'm sorry,

1 I misspoke that. Was it possible to physically locate her  
2 parents?

3 QUESTION: Nothing in the record about that here.  
4 Have you got something in the record about giving notice?

5 MR. DOLOWITZ: I have that she did not want to give  
6 notice to her parents.

7 QUESTION: Well -- no, no, the possibility, the capa-  
8 bility, the feasibility of writing a letter to the parents.

9 MR. DOLOWITZ: I believe -- okay; no. But there was  
10 no question in terms of my representations to the judge, the  
11 discussion as far as Mr. Tinker and Mr. McCarthy were concerned  
12 whether she could physically, her parents could be located.  
13 And I believe Mr. McCarthy asked her those questions and she  
14 responded that they could, that she went -- again, I think  
15 we're going on just past that, where Mr. McCarthy is asking the  
16 questions. He said, "Are you still living at home? Are you  
17 dependent on your parents?" Now, again, this may be an error.  
18 I may have been too protective of her in the trial. But there  
19 is no question that her parents could have been readily noti-  
20 fied.

21 QUESTION: Had the doctor written a letter simply  
22 stating the simple, direct fact that, your daughter has come to  
23 me to have an abortion performed and I'm prepared to do it, and  
24 under the statute I'm giving you notice that I will proceed  
25 with this procedure seven days from today, would he have

1 complied with the statute?

2 MR. DOLOWITZ: Yes. But she --

3 QUESTION: I'm not sure you've answered my earlier  
4 question about whether it affects your case one way or the  
5 other -- it would affect it one way or the other, if there had  
6 been no consultation with anyone. The girl, 10, 12, 14, 15,  
7 walked in off the street and said, I want the abortion, and the  
8 doctor said, all right, I'll give the notice, or, I won't  
9 give the notice. Is the counseling of any relevance here to a  
10 constitutional question?

11 MR. DOLOWITZ: I believe it is not. Now, I -- when  
12 I answer that, Mr. Chief Justice, I answer that knowing that  
13 a number of the members of this Court have expressed themselves  
14 in these opinions that you believe that it is, it's a wise  
15 policy to encourage the family and to some way get the families  
16 together so that that counseling occurs, so that -- I say that  
17 with some degree of trepidation when I say, no, but I say it with  
18 the knowledge that when she is initially going to someone who  
19 the State of Utah has licensed as a physician, and said that,  
20 to this regard, you have to counsel. So, in this they weren't  
21 saying that there may not be mandatory counseling, in that sense.  
22 But you're asking me, does the fact that she had that counsel-  
23 ing make it any different than if she had just walked in to the  
24 doctor and to the constitutional issue, I say, no, because this  
25 state mandates, this statute mandates that in all cases.

1 But I say that with the knowledge that you have, that at least  
2 a number of the members of this Court feel that there should be  
3 some counseling. And I say that it in fact exists because the  
4 physicians provide it. And a physician is not in a position  
5 where he is going to simply go ahead and perform it without,  
6 that type of counseling without knowing that, if you want to  
7 call it this way, his license is at risk, his malpractice  
8 insurance is at risk, if he commits a malpractice or a violation  
9 of a licensing statute. And in fact, that same protection is  
10 insidiously, I feel, undermined in this case because it moves  
11 in and if a doctor is in a situation where the minor who comes  
12 in and they sit down, no counselor, no social workers at all,  
13 and the counseling takes place one to one and the doctor says,  
14 you should be aborted, your parents should not be notified, in  
15 my best medical judgment, but I can't do it because of this  
16 statute.

17 QUESTION: Well, Mr. Dolowitz, I think you referred us  
18 to this Finding 7, didn't you, at page 40?

19 MR. DOLOWITZ: Yes, sir. Yes, Mr. Justice Brennan.

20 QUESTION: Am I to read that finding as you have just  
21 stated the proposition, that after consultation -- or rather,  
22 when consulting with her physician, he advised her that she  
23 should be aborted, that he was unwilling to perform an abortion  
24 without complying with the provisions of the statute even  
25 though he believed it was best to do so, or to perform the

1 abortion without complying with the statute? Is that the way  
2 we're supposed to read that?

3 MR. DOLOWITZ: Yes, he was not willing to do it.

4 QUESTION: Is that the way you want us to read that?

5 MR. DOLOWITZ: I want you to read that as saying that  
6 he felt in his best medical judgment, one, an abortion should  
7 be performed; secondly, that her parents should not be notified;  
8 third, that he was not willing to act on his best medical judg-  
9 ment, which was to abort her, without notifying her parents  
10 because he was at criminal risk if he did so.

11 QUESTION: That's what we read into it, even though he  
12 believed it was best to do so.

13 MR. DOLOWITZ: Do so.

14 QUESTION: It's a very ambiguous finding, isn't it,  
15 if you read it with all the nuances that Mr. Justice Brennan  
16 puts in it?

17 MR. DOLOWITZ: What I have just expressed to you is  
18 what was intended to do that and if we were not, between the  
19 trial judge and counsel we were not able to articulate it --

20 QUESTION: Did you submit the findings? Did you draft  
21 the findings?

22 MR. DOLOWITZ: I drafted the findings, Mr. Justice  
23 White.

24 QUESTION: Were they entered exactly as you drew them?

25 MR. DOLOWITZ: They were, after dispute. In other

1 words, the State submitted its set, Mr. Tinker --

2 QUESTION: And then the Court adopted yours?

3 MR. DOLOWITZ: That's correct.

4 QUESTION: Verbatim?

5 MR. DOLOWITZ: Yes, sir.

6 QUESTION: Mr. Dolowitz, does the record in fact show  
7 whether she was aborted?

8 MR. DOLOWITZ: The record does not show that. What I  
9 am trying to indicate to Mr. Justice White in responding is  
10 that both of us submitted the findings. Then Judge Winter  
11 asked us both to come in and we talked, and Mr. Tinker and I  
12 both communicated with him. And if you'll note, that hearing  
13 occurred in, I believe, April or May and the entry did not  
14 occur until, I think, it's November or December. And a big  
15 part of that was the question over the findings, getting the  
16 transcript made, and going back over the questions that had  
17 been presented.

18 Unless the Court has further questions, I would like  
19 to reserve the remainder of my time for rebuttal.

20 MR. CHIEF JUSTICE BURGER: Very well, Mr. Dolowitz.  
21 Mr. Tinker.

22 ORAL ARGUMENT OF PAUL M. TINKER

23 ON BEHALF OF THE APPELLEES

24 MR. TINKER: Mr. Chief Justice, and may it please the  
25 Court:

1           By enacting the statute which is at issue here, the  
2 parents in the State of Utah -- and after all, it's parents who  
3 are of voting age and who are represented in the Utah Legisla-  
4 ture -- have essentially said something to the effect as fol-  
5 lows: yes, we recognize that it is not possible under the  
6 Constitution for us to exercise any kind of absolute veto or  
7 place a roadblock, an absolute roadblock, in the way of our  
8 minor daughter who is living at home and who may seek to have  
9 an abortion. And it should be noted that we've conceded this  
10 even in, as early as 1974, which is when this statute was  
11 enacted, which precedes both the Danforth decision and the  
12 first Bellotti decision. But eve

13           But, even if we may not veto the decision of our minor  
14 daughter living at home who chooses to have an abortion, we at  
15 least want to know about it.

16           QUESTION: Does the statute refer to living at home?

17           MR. TINKER: No. The statute on its face --

18           QUESTION: Then why are you putting those words in  
19 your description of the statute?

20           MR. TINKER: Merely for emphasis, in that that is who  
21 the statute is primarily intended to control. The statute  
22 speaks in terms of minors, Mr. Justice Blackmun.

23           QUESTION: Yes, but how do we know that? There are  
24 many emancipated minors even in Utah, I would assume.

25           MR. TINKER: Well, and I think that is precisely the



1 separate question which is raised by this other case that  
2 Mr. Dolowitz has referred to, and which Mr. Justice Stevens has  
3 questioned the relevance here. I would suggest to this Court  
4 that the question of the emancipated minor is not before this  
5 Court, is not part of this record. It is --

6 QUESTION: The statute does not refer to an emanci-  
7 pated minor or an unemancipated one.

8 MR. TINKER: That's true.

9 QUESTION: I'd like to look at the case in the face of  
10 your statute.

11 MR. TINKER: Right. And the statute on its face  
12 describes only "minors." And my suggestion, which I don't  
13 think is entirely relevant in this case, but is clearly the  
14 heart of this other case that is still pending, is whether  
15 under Utah law, as a matter of construction of Utah law, that  
16 term minor includes emancipated minors.

17 QUESTION: Well, do you think that a minor still liv-  
18 ing at home can challenge the statute that Mr. Justice Blackmun  
19 has just described, which does not limit it that way? Does she  
20 have standing?

21 MR. TINKER: Does the minor not living at home have  
22 standing?

23 QUESTION: Does the minor living at home have stand-  
24 ing to challenge the statute on the ground that it's overbroad  
25 as to minors who are not living at home?

1 MR. TINKER: No, I don't think that that minor has  
2 that standing. And I don't think that's the case presented  
3 here at all. The case presented here is a minor 15 years old  
4 living at home, challenging the statute as it applies to her.  
5 And I don't think there's any reasonable question that can be  
6 raised that it was intended to apply to her. There can be a  
7 question raised, I think, as to whether it was intended to  
8 apply to the emancipated minor.

9 QUESTION: She's challenging the statute on its face,  
10 not as it applies to her, isn't she?

11 MR. TINKER: Well, yes. She is --

12 QUESTION: Now, somebody else, an emancipated -- let's  
13 assume that the Supreme Court of your State has already decided  
14 that the statute on its face is constitutional. On the other  
15 hand, the Federal court out in your state has decided that as  
16 applied to an emancipated minor the statute, if it does apply  
17 to an emancipated minor, is unconstitutional.

18 MR. TINKER: That's correct, Mr. Justice Stewart.

19 QUESTION: She's not -- in this case, the statute is  
20 not being challenged as applied, but it's simply being chal-  
21 lenged on its face, isn't it?

22 MR. TINKER: Yes. But I would see the facial chal-  
23 lenge as being substantially different if there were an authori-  
24 tative construction of the statute that said it cannot, by  
25 virtue of state law, apply to emancipated minors.

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QUESTION: What is a minor in Utah?

MR. TINKER: Under 18, unless married. Minors achieve their majority under Utah law if they are married; otherwise, not till 18. Now, that's by statutory law.

QUESTION: Therefore this statute could be, its constitutional validity could be attacked as it applies to people over 17, for example.

MR. TINKER: Yes.

QUESTION: But here it's being attacked on its face --

MR. TINKER: -- by a 15-year-old who it clearly --

QUESTION: -- who is living at home.

MR. TINKER: -- does apply to; yes.

QUESTION: Do you see any inherent conflict between the Federal court case and this one?

MR. TINKER: No, Mr. Chief Justice, I do not. The Federal trial court judge has taken pains in his findings to differentiate between what the Utah Supreme Court found. He has felt that that decision is binding as far as state law is concerned, so far as it goes. And he sees this as presenting a different class and a different issue. That's why I suggest that that case is irrelevant in this case as it presently stands before this Court.

QUESTION: But, Mr. Tinker, the class described in the complaint, as I understand the trial judge, he did in effect say the class was proper, includes all minor women

1 who are suffering unwanted pregnancies and desire to terminate  
2 them, which would include the emancipated minors as well as the  
3 unemancipated minors. I'm looking at page 5 of the appendix.  
4 There is nothing in the Supreme Court of Utah's opinion that  
5 says, we are only deciding the question presented by the named  
6 plaintiff as opposed to the class as a whole which had been  
7 certified.

8 MR. TINKER: But I'm not sure, Mr. Justice Stevens,  
9 that that alone, the fact that the class was not defined to  
10 exclude all these others, permits the named plaintiff to repre-  
11 sent a class that she's not part of.

12 QUESTION: Except that as a matter of state law the state  
13 judge said she's an adequate representative. And his reasoning  
14 would apply equally to emancipated or unemancipated, and the  
15 reasoning of the Utah Supreme Court would apply equally to both.  
16 Now, maybe the Federal cases are different, but it seems that  
17 if you have a class which as a matter of state law includes  
18 emancipated minors, and the Supreme Court of the State disposed  
19 of the case on the assumption that they were all before the  
20 Court, we have that issue, and I don't know why we shouldn't  
21 decide it.

22 QUESTION: Unless, as a matter of Federal constitu-  
23 tional law, a particular plaintiff doesn't have standing to  
24 make a particular argument.

25 QUESTION: That's right. And the trial judge did

1 confine it, as I read his opinion on page 14, the last part of  
2 it, "under the facts involved here where the woman in question  
3 is aged 15, unmarried, resides at home with her parents and is  
4 dependent upon them for support, and where the identity of the  
5 parents is either known to the physician or easily ascertain-  
6 able by him."

7 He did indicate that his reasoning, at least, was  
8 confined to the facts of this case in upholding the facial con-  
9 stitutionality of the statute. It was all that he did and all  
10 the Supreme Court of Utah did.

11 MR. TINKER: Well, at least there was no discussion --

12 QUESTION: Had he certified the class? That was in  
13 his order denying the temporary injunction. Didn't he there-  
14 after describe the -- except the class? Maybe we shouldn't  
15 take your time with this.

16 MR. TINKER: Well, I think the class was essentially  
17 defined at that preliminary stage and it was not changed in  
18 the subsequent proceedings.

19 Let me suggest, further, what the Legislature of the  
20 State of Utah was doing. They're saying that with respect to  
21 minors generally we as parents forego any claim to being able  
22 to veto an abortion decision. But if there is to be an abor-  
23 tion performed, we simply want notice of it.

24 QUESTION: A little due process for the parents, is  
25 that what you're saying?

1 MR. TINKER: That's exactly what I'm saying,  
2 Mr. Chief Justice. And we want to know about it. We would  
3 ideally like to have some input, perhaps some consultation.  
4 But even by this statute we do not mandate that. The statute  
5 on its face could be satisfied as one of the briefs has sug-  
6 gested by a mere telephone call at a certain point prior to the  
7 performance of the abortion, advising that the abortion will  
8 take place. That might not be an entirely satisfactory kind of  
9 performance under the statute, but it would be sufficient, I  
10 think, to preclude any criminal penalty upon the doctor.

11 The parents are --

12 QUESTION: And what does that accomplish? Does that  
13 enable the physician to exercise his best medical judgment a  
14 little better?

15 MR. TINKER: Among other things. He may, Mr. Justice  
16 Blackmun, obtain additional information that he might not know  
17 in the case of a girl of tender years, by talking with her  
18 parents.

19 QUESTION: And yet the statute doesn't go that far  
20 with respect to parents if the child is married, even though  
21 her husband is 16.

22 MR. TINKER: No, it does not take into account that  
23 particular situation. The parents are saying, we not only want  
24 a little due process, but they're saying, we would like to  
25 enhance the full range of choices that our daughter may have

1 in this matter. We recognize that the trend of things, if you  
2 will, in our society is very much in the direction that abor-  
3 tion will be viewed by a great many people, especially the pro-  
4 fessionals, the counselors, the doctors, and so forth, as the  
5 option of choice in this situation. In some cases we may if we  
6 had the chance merely like to give another viewpoint there.  
7 Not that our viewpoint could be binding, by any means, and not  
8 even that the statute requires the consultation, but merely that  
9 the doctor must give the opportunity for the parents to know  
10 and then it essentially becomes the doctor's own problem as a  
11 matter of ethics. It's really thrown back entirely into the  
12 private sector without the state being involved.

13 QUESTION: Is it possible the Legislature had in mind  
14 that -- or is it possible that it's inherent in the case, that  
15 the parents might be able to give something of the medical his-  
16 tory and background of the child which would be relevant to the  
17 doctor and his decision?

18 MR. TINKER: Well, the Utah Supreme Court in its  
19 unanimous decision made that specific finding but that would be  
20 one of the purposes. I don't think that's the only purpose,  
21 but I think that is a very significant one.

22 QUESTION: I'm not quite clear what it is you say  
23 would satisfy the requirement of notification. Suppose he's  
24 about ready to perform the abortion. Before he does he picks  
25 up the telephone, he gets hold of the mother of the girl, and

1 he says, I have your daughter here, I'm about to perform an  
2 abortion. Goodbye. Does that do it?

3 MR. TINKER: I'm afraid it does, Mr. Justice Brennan,  
4 on the face of the statute. As I say, I don't --

5 QUESTION: Then how much input does this contemplate  
6 that the parents will have?

7 MR. TINKER: Well, it contemplates, I think, only as  
8 much as the doctor in his professional judgment will permit.  
9 But I think most doctors, given the requirement that they must  
10 go at least that far, will at least be willing to hear a few  
11 things. Now, this gets us off into speculation again.

12 QUESTION: But I just want to be clear. They don't  
13 have to. The statute doesn't require them to go beyond what I  
14 suggested?

15 MR. TINKER: Clearly not; clearly not.

16 QUESTION: What if the mother in that hypothetical  
17 case then said, are you aware, doctor, that our daughter has  
18 been under psychiatric care for the last seven years, and the  
19 doctor says, no, I'm not aware of that. Is that something he  
20 merely must apply to his medical decision --

21 MR. TINKER: I think he has -- excuse me, I think he  
22 has a professional obligation to then take that knowledge into  
23 account. Again, the law of the State of Utah probably does not  
24 compel him to do that unless it were so egregious that it be-  
25 came a matter of malpractice. And in that respect, the statute



1 may tend to protect the doctor.

2 QUESTION: Well, that might mean, among other things,  
3 that the minor patient was not capable of giving consent to any-  
4 thing, a tonsillectomy, an appendectomy, or an abortion. Might  
5 it not?

6 MR. TINKER: It could be. You have an interesting  
7 kind of overlap in my view of legal disabilities that are occa-  
8 sioned simply by minority and legal disabilities that are occa-  
9 sioned by absolute lack of competency, mental-type lack of  
10 competency. You might have those overlapping, fitting in the  
11 same situation here. I think the teachings of this Court have  
12 been that as far as those disabilities which occur as simply  
13 because of lack of majority status are somewhat tempered, some-  
14 what moderated or modified when you're in the abortion context  
15 or in the other contexts regarding the ability to procreate.  
16 But there you get into a very difficult situation when you  
17 bring both of them in and again you have a difficult kind of  
18 balancing problem.

19 QUESTION: Mr. Tinker?

20 MR. TINKER: Yes, Mr. Justice Powell?

21 QUESTION: In the plurality opinion in Bellotti II  
22 we said this with respect to notice: "We conclude that every  
23 minor must have the opportunity if she so desires to go  
24 directly to a court without first consulting or notifying her  
25 parents." How do you construe that language, granted, of

1 course, that it is part of a plurality opinion?

2 MR. TINKER: I construe that language as relating to  
3 the situation of the Massachusetts statute which was a consent  
4 statute, not a mere notice statute like ours, and which already  
5 created the possibility of alternatives. The question of  
6 notice, which is presented in what I would suggest is a pure  
7 form in our particular case because of the nature of the stat-  
8 ute, was presented in a much more complicated scheme in the  
9 Massachusetts case.

10 QUESTION: There was an alternative in Massachusetts,  
11 the court. No alternative in Utah.

12 MR. TINKER: Right. But the reason there was an  
13 alternative in Massachusetts was that there was consent re-  
14 quired. You had to get consent from somebody. In Utah you  
15 don't have to get consent from anybody.

16 QUESTION: I have that -- I haven't read it recently,  
17 but I thought the purpose of the constitutional requirement  
18 that the plaintiff, pregnant, unmarried female, be allowed to  
19 go to a court was to convince that court that she was a mature  
20 minor. There's no claim here, is there, that the plaintiff is  
21 a mature minor?

22 MR. TINKER: Not in the pleadings of this case or in  
23 the record.

24 QUESTION: Not that she's an immature minor, is there?

25 MR. TINKER: I'm sorry?

1 QUESTION: Are we to assume she's an immature minor?

2 MR. TINKER: I believe so. I don't know of a finding  
3 to the contrary.

4 QUESTION: It's not clear at all that she's a mature  
5 minor or was prohibited or prevented from showing a court that  
6 she was.

7 MR. TINKER: No, in Utah we don't have a specific pro-  
8 cedure for showing a court any --

9 QUESTION: There wasn't in the Massachusetts legisla-  
10 tion either, and that's what we found constitutionally defi-  
11 cient, as I remember.

12 MR. TINKER: My recollection was that the Massachu-  
13 setts statute provided that if a parent refused to give consent  
14 or was unavailable, that you could then repair to the Court of  
15 General Jurisdiction and seek an order granting the consent  
16 in place of parent --

17 QUESTION: Despite the failure to give consent. But  
18 the Court held, as I remember it, that the minor should be per-  
19 mitted to go to the court for a determination that she was a  
20 mature minor and that therefore no effort to get consent was  
21 required. But now, as I understand it, in the present case,  
22 which doesn't, of course, involve consent but rather notice  
23 alone, there is no claim that the plaintiff was a mature minor  
24 and/or that she was prevented from going to a court to show that  
25 she was, is there?

1 MR. TINKER: I don't believe there is such a claim,  
2 Mr. Justice Stewart.

3 QUESTION: Mr. Tinker, may I ask on this subject, I  
4 think the record is a little unclear. As Justice Stewart has  
5 correctly pointed out, the trial judge did emphasize the spe-  
6 cific facts here in denying the injunction. Then later on  
7 there's reference to the class she purports to represent. So I  
8 have some doubt as to whether the mature minor or emancipated  
9 minor issue is here. But assume for the moment it is and recog-  
10 nizing that the point is not clear, what is the position of the  
11 State of Utah? (a) Does the statute apply to the emancipated  
12 minor? And secondly, is the statute then constitutional?

13 MR. TINKER: That's sort of the horns of a dilemma,  
14 Mr. Justice Stevens. But the --

15 QUESTION: Under the district courts, under the hold-  
16 ing in the Federal court, this statute is unconstitutional as  
17 applied to emancipated minors, is it not?

18 MR. TINKER: If it applies, he essentially found  
19 in the alternative. Either it does not apply to them, or if it  
20 does, it is unconstitutional as applied to them. And I don't  
21 disagree with the findings of the Federal District Court on  
22 that point.

23 QUESTION: That's a little ambiguous to me. On that  
24 point he gave alternative findings.

25 MR. TINKER: Yes.

1 QUESTION: And now what is it you don't disagree with?

2 MR. TINKER: Well, that it either doesn't apply or  
3 that if it should be found to apply it's unconstitutional with  
4 respect to those.

5 QUESTION: Do you have an opinion as to the matter of  
6 state law? First of all, do you have an opinion as a matter of  
7 state law as to whether it should be construed as a matter of  
8 state law to apply to emancipated minors?

9 MR. TINKER: Yes, I have an opinion, and my opinion  
10 is that it should be construed so as not to apply to an eman-  
11 cipated minor.

12 QUESTION: And is there any judicial authority in the  
13 State that has so construed the statute, other than Federal  
14 judges? Any State judges?

15 MR. TINKER: No. It has not been before the State  
16 courts for that kind of an interpretation. It's not been --  
17 interestingly enough, in contrast to the many abortion kinds of  
18 statutes which have been so severely restricted and have been  
19 attacked even before they went into effect, this statute has  
20 been in effect, was in effect for about four years before it was  
21 even challenged on this parental notice issue. And this case  
22 that is presently before the Court and the other case that  
23 Mr. Dolowitz has supplied the information regarding, that's  
24 still pending in the Federal District Court, are the only two  
25 cases that I know of, and I'm sure they're the only two cases

1 that exist.

2 QUESTION: Well, you're in effect saying the statute  
3 doesn't mean what it would appear to mean to an uninitiated  
4 reader insofar as it excludes a class of minors which are not  
5 identified on the face of the statute. Does it also exclude a  
6 class of married women? I was wondering if it is as broad in  
7 that area as it appears to be?

8 MR. TINKER: Well, I don't think it applies to married  
9 women at all because in Utah the statutory provision is that all  
10 minors achieve their majority by marriage.

11 QUESTION: No, but I'm talking about the requirement  
12 of notice to the husband of a married woman.

13 MR. TINKER: Oh. Well, that -- I see that as a com-  
14 pletely separate problem.

15 QUESTION: Oh, if she is not a minor, there is no  
16 requirement of notification.

17 MR. TINKER: Right. But another part of the statute  
18 which is not before the Court and not challenged here at all  
19 requires notice to the husband and that's what Mr. Justice Stevens  
20 is referring to.

21 QUESTION: If she is married, whatever her age, or  
22 whatever his age.

23 MR. TINKER: Yes. A married person of whatever age.

24 QUESTION: If she's not a minor, there's no require-  
25 ment of notification to her parents?

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MR. TINKER: Oh, that's definitely correct.

QUESTION: No question that she's not mature, this one. There's no question, is there?

MR. TINKER: There's no question that she's not mature?

QUESTION: Yes.

MR. TINKER: There's no question.

QUESTION: Because if she were mature, she wouldn't be included under the statute, would she?

MR. TINKER: Well, no. I'm not saying -- I did not say, Mr. Justice Marshall, that the fact that she was mature would take her out of the statute. The question of maturity in --

QUESTION: That's why I'm confused about this marriage and maturity. You used it there but you don't want to use it here.

QUESTION: I thought you said it did take her out of the statute?

QUESTION: I thought so too.

MR. TINKER: I make a distinction. One class is married. They are out by operation of law. Another class is mature, another category is emancipated. I don't believe that mature and emancipated in this context are coextensive categories.

QUESTION: By emancipated, you are referring to a

1 young person who is married and therefore not a minor within  
2 the meaning of the statute?

3 QUESTION: An emancipated minor is somebody living  
4 away from her parents and living independently, among other  
5 things.

6 QUESTION: And unmarried? ~~And~~ ~~unmarried~~

7 MR. TINKER: Among other things. Yes.

8 QUESTION: Now, is that person covered by the statute?  
9 I think I know your answer but I'm --

10 QUESTION: Well, he said in his opinion it is or  
11 ought to be.

12 QUESTION: No, no. He said it was not covered.

13 QUESTION: Not covered. But he said there's no  
14 state ruling on the subject.

15 MR. TINKER: Mr. Justice Stewart is correct in under-  
16 standing me to this point on that issue.

17 QUESTION: I apologize. The statute does apply as a  
18 matter of state law, in your opinion, to such a person?

19 MR. TINKER: No, not to the emancipated minors.

20 QUESTION: But it's just a matter of his opinion, in  
21 any event.

22 QUESTION: I understand that but I just want to know  
23 what his opinion is. Your opinion is, as a matter of state law  
24 the statute does not apply to that person?

25 MR. TINKER: To the emancipated minor.



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QUESTION: Unmarried; an emancipated minor.

MR. TINKER: Living away from home, all the other things. See, one of the difficulties is determining what constitutes an emancipated minor. I see a number of factors which go into that. A still, separate problem comes when you try to determine whether the minor is "mature." I think that's a lesser standard and a minor could be mature without being emancipated. The statute clearly takes in all minors who might be deemed mature and this comes down merely to a question of legislative line-drawing, in my view. The Legislature had to make a category of who were included, and they took the standard definition of what constitutes the line between minority and majority, the age of 18.

QUESTION: Also, maturity and immaturity?

MR. TINKER: Well, it's an arbitrary decision, in a sense, as to what constitutes --

QUESTION: Aren't you saying that if there's any maturity element in this case at all it's in the use of the word "minor" to distinguish between those under 18 and over 18?

MR. TINKER: Yes, I am saying that, Mr. Justice Stewart.

QUESTION: In other words, you don't concede that someone might be 15 and mature?

MR. TINKER: Oh, I concede that somebody might be but there's nothing in this record to suggest that anyone is.

1 QUESTION: Well, there's nothing to suggest that this  
2 15-year-old is not either, is there, in this record?

3 QUESTION: Well, doesn't the action of the State  
4 Legislature amount to a declaration that prima facie or pre-  
5 sumptively a woman under the age of 18, if not emancipated, is  
6 too immature to make that decision, at least without notice to  
7 the parents?

8 MR. TINKER: At least without notice, but with no  
9 requirement that the parent can control the decision.

10 QUESTION: Well, now, let me ask you again, is that  
11 to say, if there were evidence in this case that this 15-year-  
12 old was mature, then the statute would not apply?

13 MR. TINKER: No, I would not make that argument, sir.  
14 I would not suggest that.

15 QUESTION: But you do say, if she were away from home  
16 it would not apply?

17 MR. TINKER: Well, if she were away from home and if  
18 all the other factors -- and this is what we've gone through  
19 before Judge Jenkins in the Federal District Court, is trying  
20 to find out whether a particular girl is emancipated or not.  
21 And he's taken into account where she was living, what her  
22 source of income was, whether she's living apart on her own  
23 volition or whether the parents had something to do with that --

24 QUESTION: The thing that puzzles me is how all those  
25 criteria can be found in this rather short statute.

1 You seem to agree they can't.

2 MR. TINKER: Well, no, I'm saying --

3 QUESTION: You said if she's emancipated, the statute  
4 doesn't apply and those are all the things you look at and  
5 decide whether she's emancipated.

6 MR. TINKER: Yes, I'm saying -- But an emancipated  
7 person is not under terms of state law a minor for purposes of  
8 the statute.

9 QUESTION: Did the State make any motion for the  
10 Federal District Court to abstain on the question of state law  
11 construction?

12 MR. TINKER: I have argued the abstention question in  
13 the L. R. case and Judge Jenkins said that he would not abstain  
14 in this particular case because of the exigencies of time. The  
15 girl was near the end of the first trimester, nearing the point  
16 where the possibility of an abortion was complicated if it went  
17 longer and he felt that to send this back to a State court  
18 would aggravate that situation and so he refused to abstain.  
19 I still propose to ask Judge Jenkins to certify the question to  
20 the Utah Supreme Court, whether -- this precise question that  
21 I've been discussing with Mr. Justice Stevens, of whether an  
22 emancipated minor is included in the statute at all.

23 QUESTION: Does Utah have one of those certification  
24 statutes?

25 MR. TINKER: I just found out recently that the

1 Utah Supreme Court adopted by a minute entry, it's not in their  
2 Rules, but they've accepted one certification in the past and  
3 they tell me they're willing to accept them.

4 QUESTION: Mr. Tinker, how old is this Utah statute?

5 MR. TINKER: The statute was passed in 1974. That was  
6 was the point that I thought was significant in that it came  
7 before Danforth and before Bellotti I and of course long before  
8 Bellotti II. It was passed in '74 and challenged in this case  
9 in 1978.

10 A particular emphasis that I would like to give, just  
11 in summary, to this case is that the State of Utah has chosen  
12 in this sensitive area to keep the State and its mechanisms,  
13 its agencies, and everyone else, far removed from the decision  
14 making process. It has seen this problem as being one to be  
15 handled within the family context. And that's why I see this  
16 case as an important case involving what the limits of family  
17 participation are, what the rights of the family as a unit are.  
18 The appellant has painted a picture of many adverse consequences  
19 that might come to a young lady seeking an abortion if her  
20 parents were notified. The problem is that any of those ad-  
21 verse consequences come purely, if they come at all -- which is  
22 not in the record -- come as a matter of private action of  
23 parents. There is no state action involved. The State has no  
24 right to veto an abortion decision, much less does it have the  
25 right to delegate to someone else the right to veto an abortion

1 decision. The State is not trying to do any of those things.  
2 The State is merely trying to encourage within the private  
3 sphere of action the maximum possible parental knowledge and  
4 participation, if that is permitted by the doctor.

5 QUESTION: Was that always true in the State of Utah  
6 prior to 1973?

7 MR. TINKER: No, I believe Utah had requirements prior  
8 to 1973 that were controlled and invalidated by this Court's  
9 1973 decisions.

10 QUESTION: So that what you've just said didn't apply  
11 to Utah prior to Roe against Wade?

12 MR. TINKER: No.

13 MR. CHIEF JUSTICE BURGER: Mr. Dolowitz, do you have  
14 anything further?

15 MR. DOLOWITZ: I do, Your Honor.

16 ORAL ARGUMENT OF DAVID S. DOLOWITZ

17 ON BEHALF OF THE APPELLANT -- REBUTTAL

18 MR. DOLOWITZ: I wanted to point out to the Court  
19 briefly as a matter of history the statute actually was adopted  
20 in '75. The statute adopted in '74 was declared unconstitu-  
21 tional by a three-judge Federal court. Appeal was taken to this  
22 Court and it was dismissed when this statute was adopted in '75.  
23 It was challenged within a few weeks of being adopted. The  
24 Federal court found it very vague and abstained. That was  
25 appealed to the 10th Circuit who affirmed the abstention

1 decision. This case was filed in '77 as a result. So there  
2 has been a series of challenges to this spread out over the  
3 years.

4 Then I wanted to point out from the questions of  
5 Mr. Justice Stewart and Mr. Justice Stevens where they were  
6 talking about the mature minor or emancipated minor, none of  
7 those exist in the statute. This statute is, on its face --  
8 and Mr. Justice Stewart, you asked and I didn't fully respond  
9 about emancipation occurring. Emancipation in terms of moving  
10 out of the house, no; in terms of marriage, yes. But Utah  
11 doesn't have the emancipated minor. Mr. Tinker gave his opinion  
12 but that isn't even in the Attorney General's Office  
13 opinion, that's his personal opinion that's come about. And the  
14 problem is, this statute says, "all minors."

15 QUESTION: Well, I understand in Utah, once a woman  
16 is married, whatever her age she is no longer a minor?

17 MR. DOLOWITZ: That's a question I'm discussing. We  
18 do not have a clear answer. The statute said she gains her  
19 majority. But in terms of the question I was asked, what hap-  
20 pens if she is 16, marries someone who is 16, and you send  
21 notice to the 16-year-old husband, is now acquired. Okay.  
22 If three weeks later they get a divorce, it's determined that  
23 the marriage was a mistake. Then it's not --

24 QUESTION: Well, we don't have that case.

25 MR. DOLOWITZ: We don't. No, we don't. But the

1 problem is that this statute says, you notify the parents in all  
2 women, including -- in this case, let's say there's that 16-  
3 year-old, if there is a divorce and she now suddenly finds out  
4 she's pregnant three or four weeks later, who do you notify?  
5 The statute says, her parents.

6 QUESTION: We don't need to worry about that problem  
7 now, do we?

8 MR. DOLOWITZ: I think, Mr. Justice Burger, you do,  
9 and the reason I say that is because this statute says, all  
10 parents. There is no distinction, and it says it --

11 QUESTION: Well, if marriage emancipates a minor  
12 woman, divorce does not probably vitiate --

13 MR. DOLOWITZ: Utah law doesn't -- Utah law isn't  
14 clear on that point. I can't give you an answer on that. And  
15 picking up on --

16 QUESTION: I think you'd lose a lot of weight when  
17 you talk about divorces. Why don't you talk about annulments?

18 MR. DOLOWITZ: Okay. That's also a problem. I will  
19 accept that.

20 QUESTION: What are you -- you'll lose that point, point?

21 QUESTION: Doesn't all of this add up to making some  
22 sense of the idea that we have not applied the overbreadth  
23 doctrine except in cases dealing with free speech generally as  
24 a matter of standards?

25 MR. DOLOWITZ: I think in this case that it must be

1 done in overbreadth, because that's what was done. And the que  
2 questions that you've asked, first me and then Mr. Tinker, have  
3 demonstrated how overbroad the statute is. Remember,  
4 Mr. Justice Rehnquist, that the Utah Supreme Court between the  
5 the time this was argued to Judge Winder, who had before him  
6 only the lower court decision in Bellotti, and the Utah Supreme  
7 Court decision, this Court rendered its Bellotti II decision  
8 and that case was argued by me twice to the Utah Supreme Court.  
9 Because after this Court enunciated that decision, I filed a  
10 motion with the Utah Supreme Court for an intermediate injunc-  
11 tion enjoining the statute, and argued many of the points that  
12 we've covered today. They denied it, said they would defer it,  
13 set us on an early calendar. Mr. Tinker and I argued it again.  
14 They had it, they knew about the problems of the mature minor,  
15 but they didn't exempt the mature minor, they didn't, they knew  
16 about the discussion in terms of best interest.

17 QUESTION: But you were free also to go to the Circuit  
18 justice and ask for the same relief, were you not?

19 MR. DOLOWITZ: At that point, Mr. Justice Rehnquist,  
20 that's true. But I had staring at me a 10th Circuit decision  
21 saying that the trial court was correct in abstaining because  
22 the statute was vague, because the Utah Supreme Court hadn't  
23 said what that language "if possible" meant. And I didn't have  
24 a ruling until when the decision came out in March of this year.  
25 It was at that time that we had a definition as to what the



1 statute was and instead of doing that, further cases were filed  
2 in the Federal District Court because we finally had an inter-  
3 pretation of what the language "if possible" meant.

4 QUESTION: Mr. Dolowitz, do you agree with Justice  
5 Brennan that the answer to Mr. Justice Brennan's question that  
6 if 10 minutes before performing the abortion the doctor called  
7 up the parents and said, I'm about to abort your daughter, I  
8 want to give you notice in compliance with the statute. -- He  
9 does so and then aborts. It. There would be no danger to inter-  
10 ference with the -- I mean, it would be no violation of the  
11 statute if he went ahead and there would be no terrible danger  
12 that he could --

13 MR. DOLOWITZ: I do agree with Mr. Tinker that that  
14 would be compliance with the statute, which is what shows that  
15 despite its --

16 QUESTION: And if it's that easy to comply with it,  
17 how can you seriously argue that it substantially burdens the,  
18 a woman's private right to choose a decision?

19 MR. DOLOWITZ: Because if that, if the reason that he  
20 did that is that he knew, for example, that the parents were  
21 unbalanced and she risked physical injury when they found out,  
22 that injury, risk is still waiting for her when she gets home,  
23 if she gets home, or when she next meets her parents, if she's  
24 afraid to go home. They can still hurt her.

25 QUESTION: So you'd say it would be equally unconsti-

1 unconstitutional if there was a requirement that two hours after  
2 an abortion is performed they notify the parents because they  
3 might be unhappy about it?

4 MR. DOLOWITZ: Yes. It is still too overbroad.

5 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

6 The case is submitted.

7 (Whereupon, at 2:16 o'clock p.m., the case in the  
8 above-entitled matter was submitted.)  
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CERTIFICATE

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of aral argument before the Supreme Court of the United States in the matter of:

No. 79-5903

H. L., Etc.

v

Scott M. Matheson, et al

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY: Will J. Wilson

William J. Wilson

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